



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,651-03

EX PARTE ADAM KELLY WARD, Applicant

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
AND MOTION TO STAY THE EXECUTION
FROM CAUSE NO. 23,182 IN THE 354TH JUDICIAL DISTRICT COURT
HUNT COUNTY**

NEWELL, J., filed a concurring statement.

CONCURRING STATEMENT

In this case, Applicant raises a claim in his subsequent application for habeas corpus relief that is identical to one raised in his federal habeas corpus applications. *Ward v. Stephens*, 777 F.3d 250, 269 (5th Cir. 2015). Applicant argued before the Fifth Circuit that in light of the United States Supreme Court decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) the Eighth Amendment prohibits the execution of the severely mentally ill. The Fifth Circuit rejected this argument holding that “reasonable jurists could not debate whether Ward’s death sentence violates the Eighth

Amendment” in light of the Fifth Circuit’s precedent. *Ward*, 777 F.3d at 269. The United States Supreme Court denied review of that decision. *Ward v. Stephens*, 136 S.Ct. 86 (2015).

Additionally, this Court considered the identical claim in *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010). In a unanimous opinion authored by Judge Cochran, this Court held that the Eighth Amendment does not categorically exclude defendants suffering from severe mental illness from the imposition of the death penalty. *Id.* Applicant does not point to any Supreme Court precedent announcing a contrary rule. *See Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014). Even if we were to determine that Applicant properly raised these claims in a subsequent application for a writ of habeas corpus, the issue has been decided against Applicant.

However, I also agree with the Court that Applicant cannot satisfy the exceptions to the procedural bar against subsequent applications for habeas corpus relief. The United States Supreme Court decided both *Atkins* and *Roper* prior to Applicant’s trial in this case. The Fifth Circuit noted when rejecting Applicant’s application for federal habeas corpus relief that Applicant’s mental health was the central issue throughout Applicant’s trial and appeal. *Ward*, 777 F.3d at 259. Applicant’s diagnoses of anti-social personality disorder and bi-polar disorder were available at trial and presented to the jury. Consequently, this Court properly dismisses Applicant’s subsequent application for habeas corpus relief because both the legal and factual claims raised in this application were available when Applicant filed the

previous application. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West 2015).¹ This Court also properly dismisses Applicant's subsequent application for habeas corpus relief because he has failed to show that his death sentence violates the United States Constitution. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West 2015); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010).

With these thoughts I join the Court's order.

Filed: March 14, 2016

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¹ Notably, this Court rejected the same Eighth Amendment argument that Applicant makes in his subsequent writ in *Mays v. State* prior to resolution of Applicant's first application for habeas corpus relief.